Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-1139

THE CITY OF NEW YORK, JAMES WALKER, and JOSEPH CARRINO,

Petitioners,

-against-

JOHN N. DePIETRO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOHN N. DePIETRO,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The City of New York, James Walker, and Joseph Carrino petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The order and judgment of the Court of Appeals (2a-5a)* is reported without published opinion at 607 F. 2d 995. The order of the District Court is unreported and is annexed hereto at page 1a of petitioners' Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered June 6, 1979. A timely motion for rehearing en banc was denied on October 25, 1979 (6a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Is remittitur practice properly utilized by a federal appellate court where the court clearly, albeit implicitly, indi-

*Numbers in parentheses followed by "a" refer to the pages of the Appendix annexed hereto.

cates that prejudicial error occurred bearing upon the liability of one of the defendants?

2. Is the Court of Appeals' order granting a remittitur, but allowing plaintiff to retain substantial compensatory damages ($10,000) where no evidence of any actual injury was elicited, in conflict with the principles enunciated by this Court in Carey v. Piphus?

3. Are police officers, prior to taking a person into custody, constitutionally required to verify information, supplied to them by a fellow officer, that an outstanding warrant of which they do not have possession exists for the arrest of the person named in the warrant?

4. On the facts of the instant case, were the individual petitioners entitled

to the defense of good faith as a matter of law?

5. On the facts of the instant case, was there sufficient evidence shown to hold the defendant municipality liable to plaintiff under §1983?

Statement of the Case

On June 4, 1977, plaintiff-respondent John N. DePietro (hereinafter "plaintiff") was arrested by defendants James Walker and Joseph Carrino based on information supplied by their precinct warrant officer in late April, 1977 that an outstanding warrant existed for plaintiff's arrest (A190, 191).* The defendants did not have possession of the warrant when making the arrest and did not know the offense charged

*References preceded by "A" are to pages of appellant's Appendix in the Circuit Court

therein (A194). Plaintiff was taken to the 63rd Precinct stationhouse in Brooklyn, New York, only a few miles from the scene of the arrest, and booked. At this time, a computer check was performed on the warrant to obtain information from it necessary for booking and to determine whether the warrant was still outstanding (A181). It was discovered that the warrant had been previously executed on May 6, 1977, less than a month earlier (A129, 141, 182). Plaintiff was immediately released (A182). He was in custody at the stationhouse approximately 45 minutes to one hour (A8, 9).

The defendants testified that, to their knowledge, the procedure employed when an arrest is made on an outstanding warrant not in the possession of the arresting officers is to take the

suspect into custody and then verify the warrant's status by computer check at the stationhouse (A199). The defendant officers testified that they believed it was not possible to obtain that data via the police car radio notwithstanding that under certain circumstances information regarding the ownership of an automobile could be obtained in that manner (A203-204, 229). Officer Carrino testified that he had never heard of warrant information being transmitted over the police car radio (204), and Officer Walker stated that "[t]hey will not give that information over the air" (229).

With respect to the District Court's charge to the jury on the City

of New York's liability under §1983, the following instructions were recited (A268):

> In order to hold the defendant City of New York responsible on the second claim, you must find that the action that is alleged to be unconstitutional, that is the alleged unlawful arrest, implemented or executed a policy statement, ordinance, regulation or decision officially adopted and promulgated by those whose edicts or acts may fairly be said to represent the official policy of the City of New York.
>
> In addition, the defendant City of New York is responsible for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through defendant City of New York's official decision-making channels.

No further clarification of this language, taken verbatim from Monell v. New York City Department of Social Services, 436 U.S. 658, 690-691 (1978), was supplied,

and the court did not explain its application to the relevant facts.

Defendants took no exceptions to the charge at that time, and made no requests for supplemental instructions (A280). Nor were objections voiced to the special verdict questions propounded to the jury. However, during the jury's deliberations, defendants did object to the court's rereading of its Monell charge in response to the jury's request for an explanation of special verdict question number four, dealing with the City's liability (A 292).* The court did not agree to modify its charge, and no explanation thereof was provided to the jury.

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*Defendants excepted, suggesting that "the holding must be clear policy that is officially promulgated by the City of New York or by any municipality. It is not simply because of the employees, it is official policy" (A292).

On the issue of damages, plaintiff testified that he was in the process of building two homes in Brooklyn* valued at $125,000 each, and that applications for credit submitted at two banks were denied (A10, 12, 13). No evidence was adduced, however, as to the dates of the applications or the reasons for their denial, and no dollar amount in damages was stated.

The jury found in favor of the plaintiff against all the defendants and awarded him $20,000 in compensatory damages and $10,000 in exemplary damages.

On appeal, the Court of Appeals reversed the judgment of the District Court and ordered a new trial unless the plaintiff agreed to remit all

*Plaintiff described his occupation as "builder-constructor" (A4).

compensatory damages in excess of $10,000 and all punitive damages, in which case the judgment would be affirmed. Plaintiff thereafter chose to accept the conditions imposed in the Court of Appeals' order.

The Court of Appeals further stated in its order that should a new trial be had,

> [T]he district court should explain to the jury the meaning of the phrase "implemented or executed a policy statement, ordinance, regulation or decision officially adopted and promulgated by those whose edicts or acts may fairly be said to represent the official policy of the City of New York," adapted in the court's charge from Monell v. Department of Social Services, 436 U.S. 658, 690, 694 (1978), as the basis for the City's liability under 42 U.S.C. §1983, assuming that the plaintiff introduces sufficient evidence of such a statement, ordinance, regulation, or decision to warrant the instruction. The court should also instruct the jury that although liability of the City under Monell may be based on a "governmental 'custom,'" id. at 691, that custom, too, in order to give rise to liability, must be

followed "by those whose edicts or acts may fairly be said to represent the official policy of the City." Custom followed only by mere employees is not a basis of liability (5a-6a).

A petition for rehearing en banc was denied on October 25, 1979 (7a-8a).

REASONS FOR GRANTING THE WRIT

1. THE DECISION GRANTING REMITTITUR WAS IMPROPER AND CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT AND THE CIRCUIT COURTS AS WELL AS WITH GENERAL PRINCIPLES OF LAW.

In allowing plaintiff to remit that portion of the damages apparently deemed excessive, but otherwise to retain the benefit of his judgment obtained against all defendants, the Court of Appeals acted without basis in the law as established by this Court and the circuit courts.

Federal remittitur practice, whether on the trial or appellate level, hereto-

fore has been utilized in only two situations: (1) where excessiveness of damages was the only viable issue confronting the court (see, e.g., Washington and Georgetown R. Co. v. Harmon, 147 U.S. 571 (1893); Joiner Systems, Inc. v. AVM Corp., Inc., 517 F. 2d 45 (3d Cir., 1975); Grunenthal v. LIRR Co., 388 F. 2d 480 (2d Cir., 1968), revd. on other grds., 393 U.S. 196 (1968); Wicks v. Henken, 378 F. 2d 395 (2d Cir., 1967); Dagnello v. LIRR Co., 289 F. 2d 797 (2d Cir., 1961); Hill v. LIRR Co., 257 F. 2d 737 (2d Cir., 1958); American Oil Co. v. Colonial Oil Co., 130 F. 2d 72 (4th Cir., 1942), cert. den., 317 U.S. 679 (1942); Becker Bros. v. United States, 7 F. 2d 3 (2d Cir., 1925); Blunt v. Little, 3 F. Cas. 760 (C.C.D. Mass., 1822) (No. 1578), and (2) where "reversible error [is] committed at the trial, such

as erroneous admission of evidence or erroneous instructions, and the maximum effect upon the amount of the verdict due to the error can with reasonable accuracy be determined." 6A Moore, Fed. Prac. ¶59.05 [3] (2d Ed., 1974) (emphasis added). See also, Hansen v. Boyd, 161 U.S. 397, 411 (1896); Kennon v. Gilmer, 131 U.S. 22, 29 (1889); Edwards v. Sears, Roebuck & Co., 512 F. 2d 276, 283 (5th Cir., 1975); Lanfranconia v. Tidewater Oil Co., 376 F. 2d 91 (2d Cir., 1967); International Paper Co. v. Busby, 182 F. 2d 790, 792 (5th Cir., 1950); Grand Trunk R. Co. v. H. W. Nelson Co., 118 F. 2d 252, 254 (6th Cir., 1941), cert. den., 389 U.S. 951 (1967); cases cited in 6A Moore, supra, at pp. 59-65 to 59-66 and notes 43 and 44.

While in the present case there was no explict statement by the Court of Appeals that prejudicial error existed in the trial, the implication that such error did occur in the judge's charge is unmistakable. In addition to finding that the damages were excessive, the panel instructed the District Court, should a new trial be had, and assuming the plaintiff introduces evidence to justify the instruction, to "explain to the jury the meaning of the phrase 'implemented or executed a policy statement, ordinance, regulation or decision officially adopted and promulgated by those whose edicts or acts may fairly be said to represent the official policy of the City of New York,' adapted in the court's charge from Monnell v. Department of Social Services,

438 U.S. 658, 690, 694 (1978), as the basis for the City's liability under 42 U.S.C. §1983" (4a). The court further directed the judge to instruct the jury that governmental custom, in order to give rise to liability, must be followed 'by those whose edicts or acts may fairly be said to represent the official policy of the City.' Custom followed only by mere employees is not a basis of liabililty" (6a).

Petitioners respectfully submit that the court below has clearly, albeit implicitly, evidenced its dissatisfaction with the trial court's charge regarding the City's §1983 liability, and, as such, has determined that the excessiveness of the verdict was not the sole issue on appeal, but, rather, that liability was also in

question. No other interpretation is possible.

That the Court of Appeals felt compelled to so instruct the District Court concerning liability is a clear indication that it believed the City had been prejudiced by the trial court's abstract and unexplained language on municipal liability taken verbatim from this Court's opinion in Monell v. New York City Department of Social Services, supra, 436 U.S. at 690-691. The Court of Appeals thus recognized that the bare language in Monell could not be submitted to a jury of laymen without further clarification of its import, lest the jury be permitted to assign liability based upon sheer speculation. In this regard, it should be noted that the jury did in fact request elucidation of the

Monell charge, which request was denied, over the defendants' objection (A292-293).

The Court of Appeals recognized that, under Monell, "[c]ustom followed only by mere employees is not a basis of liability" (4a). The plaintiff never proved that the alleged policy or custom of bringing arrested persons to a police station prior to checking the status of the warrant was officially adopted or sanctioned by the municipal defendant, insofar as there is no evidence that the policy was adopted by any person or persons sufficiently highly placed in city government or the Police Department to give rise to a basis of municipal liability under Monell. See, Monell, supra, at pp. 690-691; Smith v. Ambrogio, 456 F. Supp. 1130 (D. Conn.,

1978). Hence the granting of a remittitur of damages found against all three defendants, rather than ordering a new trial at least with respect to the City defendant, was, we submit, clearly error.

In Wiggin v. Coffin, 29 F. Cas. 1157, 1161 (C.C.D. 1836) (No. 17,626), in which an unconditional new trial was ordered, Mr. Justice Story, who originated the practice of remittitur in the federal courts (see Blunt v. Little, 3 F. Cas. 760 (C.C.D. Mass., 1822) (No. 1578)), noting that upon the evidence the Court "would have been better satisfied with a verdict for the defendant", stated that only if "the case was a clear one, for reasonable damages," should the plaintiff be permitted "to remit what the

court would deem to be a clear excess." The obvious implication from the above is that remittitur should not be applied in doubtful cases. Cf., Dimick v. Schiedt, 293 U.S. 474, 485 (1935).

The commentators are in agreement that remittitur, on the facts of this type of case, should not be granted. See, 6A Moore, Fed. Prac. ¶ 50.05 [3], p. 59-59 (2d Ed., 1974) (If "it appears that the jury erred or abused its discretion not only on the issue of damages, but on the issue of liability, the trial court must unconditionally order a new trial and cannot give plaintiff the option to accept a lesser amount") (emphasis in original); 2 Sedgwick on Damages, §1331, p. 2681 (9th Ed., 1920) ("The Court should be well satisfied

with the finding of the jury upon other issues, before the verdict is allowed to stand upon a remittitur being entered."); 2 Sutherland on Damages, §459, p. 1250 (3d. Ed., 1903) (No remittitur where "error in the proceedings has tended to produce an improper verdict").

Nor can the lower court's decision, allowing a conditional new trial, be justified on the ground that the error in the charge affected the verdict only so far as damages were concerned, and that, consequently, the court merely eliminated whatever excess it found. First, the Court of Appeals' order contains no language even remotely intimating that possibility. Furthermore, it cannot be determined with any degree of certainty how much of the verdict was affected by the instructions, since the damages

were not apportioned individually among the three defendants, and particularly since the questioned instructions bore strictly upon liability, in contrast to damages. Moreover, as there was not a shred of testimony tending to prove the damages suffered by plaintiff, it would be impossible to ascertain what the excess was. See cases cited in 6A Moore, Fed. Prac. at p. 59-48 and notes 43 and 44 at pp. 59-64 to 59-65.

The court would have engaged in mere conjecture were it to have attempted to establish that part of the damages traceable to the erroneous charge with respect to the City's liability. Similarly futile would have been an endeavor to find the maximum affect of the error on the verdict. See, 6A Moore, Fed. Prac. at p. 59-65;

Kendall v. United Air Lines, 200 F. 2d 269, 271 (2d Cir., 1952); Grand Trunk Western R. Co. v. H. W. Nelson Co., 118 F. 2d 252, 254 (6th Cir., 1941); Companhia De Navegacao Lloyd Brasileiro v. C. G. Blake Co., 34 F. 2d 616, 619 (2d Cir., 1929); Becker Bros. v. United States, 7 F. 2d 3, 8 (2d Cir., 1925).

Having recognized that the District Court did not adequately convey to the jury the law of municipal liability via the Monell instructions, and having reversed only to the extent of allowing plaintiff the option of remittitur, the Court of Appeals committed an egregious error of law warranting review by this Court.

In the circumstances at bar, to have allowed this type of remittitur relief was both internally inconsistent and

inconsistent with decisions of this Court and the circuit courts.

2. THE SECOND CIRCUIT'S DECISION IS IN CONFLICT WITH THE RECENT DECISION OF THIS COURT IN BAKER v. McCOLLAN

In Baker v. McCollan, 99 S. Ct. 2689 (1979), this Court held that negligent acts of police officers do not necessarily rise to the level of a constitutional violation imposing liability under 42 U.S.C. §1983 even though such acts may give rise to a private cause of action in tort. Baker was an action to recover damages for failure of the sheriff to investigate and determine whether the wrong man had been imprisoned. This Court found no liability where the arrest was based on probable cause pursuant to a facially valid warrant and the detention (three

days) was not so lengthy that it violated the accused's rights to liberty and a speedy trial. In other words, there was no constitutional violation upon which §1983 liability could be predicated. Under such circumstances, this Court continued, a police officer is not constitutionally required "to independently investigate every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent. Nor is the official charged with maintaining custody of the accused named in the warrant required by the Constitution to perform an error-free investigation of such a claim" (99 S. Ct. at 2695).

In the case at bar, it was plaintiff's contention that the defendant police officers violated his civil rights in failing to conduct a pre-arrest investigation as

to whether the facially valid warrant, which they believed was outstanding and under which they acted, although not in possession thereof, was still outstanding. Baker suggests that such a pre-arrest warrant check is not constitutionally dictated.

If, indeed, the police officers in the instant matter had had possession of the facially valid warrant when making the arrest and later determined that it was defective, Baker would save them harmless. We submit that no different result should follow where the police effect the arrest in good faith, on notice from a brother officer given only a little more than a month prior to the arrest, that a warrant existed for the arrest. If an independent investigation is not required in the Baker situation, then, likewise, it should not

be mandatory in the situation at bar.

Under New York law, in contrast to the common law of arrest, the officer need not have the warrant in his possession when he makes the arrest, and there is no requirement that he, at that time, inform the arrested person of the charge or charges, or even that the officer know the charge for which the arrest is made. See, N.Y. Criminal Procedure Law §120.80(2) (McKinney 1971). To hold that officers who act in reliance on that law nevertheless may be cast in damages operates effectively as a trap for the unwary. On the facts of this case, clearly the officers' good faith belief that they should, and were entitled to, arrest plaintiff was reasonable under the circumstances and required a determination

in their favor as a matter of law. Cf., Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc., 456 F. 2d 1339, 1348 (2d Cir., 1972) (on remand); People v. Martinez, 37 NY 2d 662, 668 (1975).

Accordingly, we believe that the Court of Appeals' decision, in mandating that police officers who do not have physical possession of an arrest warrant when making an arrest of a person they see on the street, but who are told by a brother officer that a warrant is outstanding, must nevertheless perform an on-the-spot warrant check prior to taking the person into custody, is contrary both to New York law and to the law as stated by this Court in Baker v. McCollan.

3. THE DECISION OF THE COURT BELOW CONFLICTS WITH THIS COURT'S DECISION IN CAREY V. PIPHUS AS WELL AS WITH DECISIONS OF THE CIRCUIT COURTS.

Plaintiff was originally awarded $30,000 in damages - $20,000 compensatory and $10,000 punitive - for an unlawful arrest and detention of from 45 minutes to one hour. The award was subsequently reduced on appeal to $10,000 in compensatory damages. Petitioners submit that the damages which plaintiff was ultimately permitted to retain bear no rational relationship to any proof of actual injury suffered by him, and that the Second Circuit's refusal to allow only nominal damages was in direct conflict with this Court's recent opinion in Carey v. Piphus, 435 U.S. 247 (1978).

Plaintiff failed to offer any probative evidence whatsoever that he suffered actual, albeit intangible, injury as a result of his arrest. Indeed, the only testimony on that point was of his being denied credit by two banks, which denial forced him to halt certain construction (A11-13). Plaintiff did not testify that the failure to obtain credit was causally, or in any manner, related to his arrest. He simply informed the jury of the rejection of his applications and no more. The jury was not advised as to how the banks might have obtained the allegedly damaging information of plaintiff's arrest, or why this particular arrest would have provoked the rejection of his loan request when the evidence clearly established that plaintiff had

also been arrested on other occasions. Consequently, the jury was left to speculate first, whether the arrest in fact caused the loss of credit, and, second, if it did, what the actual loss was. So tenuous was this evidence that the jury was not even provided with the approximate date of the credit rejections so as to tie them, if only coincidentally, to the arrest.

More importantly, testimony by plaintiff of his outrage at the arrest, injury to his reputation, or humiliation due to the arrest was totally lacking. The jury was simply left to presume that such injury occurred. On this set of facts, we submit, plaintiff plainly was entitled to no more than nominal damages. See, e.g., Carey v. Piphus,

supra, 435 U.S. at, 266, and n. 24 at 266-267.*

In Carey v. Piphus, supra, this Court flatly rejected the contention that damages for mental distress caused by a denial of due process could be presumed to exist. Rather, it embraced the position that "plaintiffs at least should be put to their proof on the issue, as plaintiffs are in most tort actions" (435 U.S. at 262).

This Court went on to observe (435 U.S. at 263-264):

> We foresee no particular difficulty in producing evidence that mental and emotional distress was caused by the denial of procedural due process itself. Distress is a personal

*Indeed, at the close of plaintiff's case, the District Court commented on the proof of damages, expressing its doubts as to whether plaintiff had satisfied the jurisdictional element of $10,000 "based on the presentation that you made" (App. 58).

> injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff. In sum, then, although mental and emotional distress caused by the denial of procedural due process itself is compensable under §1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused. (Emphasis added.)

See also, Codd v. Velger, 429 U.S. 624, 630-631 (1977)(Brennan, J., dissenting); Wood v. Strickland, 420 U.S. 308, 319 (1975); Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narc., 403 U.S. 388, 397 (1971); id., at 408-409 (Harlan, J., concurring); Adickes v. S. H. Kress & Co., 398 U.S. 144, 232 (1970) (Brennan, J., concurring and dissenting). The decision sought to be reviewed also conflicts with rulings in other circuits and even with prior cases in the Second Circuit on this

issue. See, e.g., Rodriguez de Quinonez v. Perez, 596 F. 2d 486, 491 (1st Cir., 1979); White v. Rochford, 592 F. 2d 381, 385 (7th Cir., 1979); Burt v. Abel, 585 F. 2d 613, 616 (4th Cir., 1978); Huntley v. Community Sch. Bd., 579 F. 2d 738, 740 (2d Cir., 1978); Davis v. Village Park II Realty Co., 578 F. 2d 461, 463 (2d Cir., 1978); United States ex rel. Tyrrell v. Speaker, 535 F. 2d 823, 829-830 (3d Cir., 1976); United States v. Oswald, 510 F. 2d 583, 590 (2d Cir., 1975); Magnett v. Pelletier, 488 F. 2d 33, 35 (1st Cir., 1973); Stolberg v. Members of Bd. of Trustees, 474 F. 2d 485, 488-489 (2d Cir., 1973); Donovan v. Reinbold, 433 F. 2d 738, 743 (9th Cir., 1970).

Conclusion

A writ of certiorari should issue to review the judgment and order of the Second Circuit Court of Appeals.

January 21, 1979

Respectfully submitted,

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APPENDIX A
ORDER OF THE DISTRICT COURT

RELEVANT DOCKET ENTRIES

Date	NR.	Proceedings
1-16-79	8.	Fld Judgment #79,0067..... Ordered.....That pltff. have judgment against defts in the amount of $30,000. jointly & severally.....Ward, J. ... Judg. ent. 1-17-7 Clerk. mn

APPENDIX B
ORDER OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 6th day of June, one thousand nine hundred and seventy-nine.

Present:
Hon. James L. Oakes,
Hon. Ellsworth A. Van Graafeiland,
Circuit Judges.
Hon. Milton Pollack,
District Judge.

79-7118

John N. DePietro,
Plaintiff-Appellee,

v.

The City of New York, James Walker, and Joseph Carrino,
Defendants-Appellants.

O R D E R

Appeal from an order and judgment of the United States District Court for the Southern District of New York, Robert J. Ward, Judge, following a jury verdict in

plaintiff-appellee's favor in the amount of $20,000 compensatory damages and $10,000 punitive damages against the City of New York and two police officers in plaintiff's action pursuant to 42 U.S.C. § 1983 for false arrest and violation of civil rights. The court below denied defendants' motion to set aside the verdict as being excessive and unsupported by the evidence.

On consideration of the briefs and the oral arguments of counsel, it is now hereby ordered, adjudged and decreed that on the basis of plaintiff's evidence the award of damages against all defendants was excessive. Accordingly, the judgment of the district court must be reversed and a new trial ordered. We will, however, withhold entry of the judgment for 30 days within which time plaintiff may, if he

chooses, file with the clerk of the district court a remittitur of all compensatory damages in excess of $10,000 and of all punitive damages. Plaintiff shall then file in the office of the clerk of this court a certified copy of the remittitur filed in the district court. If plaintiff files a remittutur, the judgment of the district court, less the amount remitted, will be affirmed; otherwise, the judgment will be reversed and a new trial ordered. See, Joiner Systems, Inc. v. AVM Corp., 517 F. 2d 45, 49 (3d Cir. 1975); cf. Dimick v. Schiedt, 293 U.S. 474, 482-83, 484-85 (1935); Grunenthal v. Long Island Rail Road Co., 393 U.S. 156 (1968) (both cases recognize practice of remittitur or conditional new trial in federal

courts). But see generally Note, Remittitur Practice in the Federal Courts, 76 Colum. L. Rev. 299, 310 (1976) (remittitur authorized on appeal, but exercise of remittitur power by appellate court criticized).

In the event of a new trial, the district court should explain to the jury the meaning of the phrase "implemented or executed a policy statement, ordinance, regulation or decision officially adopted and promulgated by those whose edicts or acts may fairly be said to represent the official policy of the City of New York" adapted in the court's charge from Monell v. Department of Social Services, 436 U.S. 658, 690, 694 (1978), as the basis for the City's liabililty under 42 U.S.C. §1983, assuming that the plaintiff introduces

sufficient evidence of such a statement, ordinance, regulation, or decision to warrant the instruction. The court should also instruct the jury that although liability of the City under Monell may be based on a "governmental 'custom,'" id. at 691, that custom, too, in order to give rise to liability, must be followed "by those whose edicts or acts may fairly be said to represent the official policy of the City." Custom followed only by mere employees is not a basis of liability. Id. at 694; cf. Adickes v. S. H. Kress & Co., 398 U.S. 144, 167 (1970).

Judgment in accordance with foregoing.

James L. Oakes

Ellsworth A. Van Graafeiland
Circuit Judges

Milton Pollack
District Judge

APPENDIX C
ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-fifth day of October, one thousand nine hundred and seventy-nine.

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JOHN N. DePIETRO,

Plaintiff-Appellee,

v. 79-7118

THE CITY OF NEW YORK, JAMES WALKER and JOSEPH CARRINO,

Defendants-Appellants.

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A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, the City of New York

and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Irving R. Kaufman
Chief Judge